Filed 7/27/10 In re Darrion J. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re DARRION J., a Person Coming Under the Juvenile Court Law.	B217341 (Los Angeles County Super. Ct. No. FJ44303)
THE PEOPLE, Plaintiff and Respondent, v. DARRION J., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Shep Zebberman, Juvenile Court Referee. Reversed.

Torres & Torres and Tonja R. Torres for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Darrion J. was placed home on probation after the juvenile court sustained a petition declaring him a ward of the court under Welfare and Institutions Code section 602, based on a finding that appellant was in contempt of court under Penal Code section 166, subdivision (a)(4), and for deliberately violating the terms of a gang injunction entered against the Black P Stones (BPS). In his timely appeal, appellant raises a variety of contentions, including that the juvenile court violated his federal constitutional rights to due process and a fair trial by excluding as irrelevant evidence that appellant was not a BPS member. We agree with appellant that the excluded evidence was relevant and its exclusion prevented him from making a viable collateral challenge to underlying gang injunction. Accordingly, we reverse the juvenile court's jurisdictional finding and need not reach appellant's other contentions, except to the extent his claim of insufficiency of evidence bears on the issue of whether the reversal of the judgment bars retrial.[1]

STATEMENT OF FACTS

The juvenile court granted a preliminary injunction against the BPS gang and its members on July 25, 2006, retraining them and "all persons acting under, in concert with, for the benefit of, or in association with them" from taking part in specified activities found to be nuisances within defined boundaries of Los Angeles. Among the activities

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[1] Appellant also contends (1) the juvenile court prejudicially erred in denying his motion to discover the personnel records of Los Angeles Police Department Officer Felipe Rodriguez pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; (2) there was constitutionally insufficient evidence to support the true finding of contempt because there was no substantial evidence that appellant knew he was associating with gang members or knew he was trespassing in violation of the injunction's terms; (3) the cumulative effect of trial errors resulted in a miscarriage of justice; and (4) the juvenile court erroneously imposed a maximum term of confinement.

proscribed by the injunction were associating "with any known [BPS] gang member" and trespassing in any property not open to the general public without the owner's consent.

On January 20, 2008, at 9:30 p.m., Officer Rafael Ortiz was on patrol, when he saw appellant. Officer Ortiz previously had numerous consensual encounters with appellant, and knew him to be a BPS member. At least twice before, appellant was in the company of other BPS members. Appellant was dressed in BPS attire, including a red canvas belt with a "J" on the buckle, which the officer believed was meant to signify "Jungles," a BPS "click." The officer took appellant to the police station, where he served him with a copy of the BPS injunction. When appellant's father arrived at the station to pick appellant up, the officer served him too. Officer Ortiz was present when his partner completed a proof of service form as to appellant and his father. Attached to the form was a photograph of appellant.

In the late afternoon of November 20, 2008, Officer Felipe Rodriguez and his partner stopped their marked patrol car at an apartment complex on Santa Rosalia Drive in Los Angeles. The location was known as a BPS hangout where illegal drug transactions took place. Officer Rodriguez had made narcotics-related arrests there in the past. A no trespassing order was clearly posted at the apartment security gate. Appellant was standing by the security gate, engaged in a conversation with two males.

Officer Rodriguez was familiar with appellant, whom he believed was a BPS member with the moniker, "Little Dough Boy."[2] Appellant was conversing with Shunday Smith, who wore BPS gang attire—an oversized leather Saint Louis Cardinals jacket. The jacket's red color and "STL" insignia were indicative of BPS membership. The insignia was understood among active gang members as referring to "Stone Love."

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[2] At that time, Officer Rodriguez had received information from senior officers in the department's gang unit, as well as police records, to the effect that appellant was a BPS member. While detained at the Santa Rosalia location, appellant admitted his BPS membership and moniker.

The two officers detained appellant, Smith, and the other male, Davion Cole, for trespassing and violating the gang injunction. Smith said that he was on parole for narcotics-related offenses, and he was familiar with the injunction. His moniker was "Molly B." Appellant confirmed that he had been served with the injunction. Cole said he lived in the apartment complex and was released, but appellant and Smith did not have a legal right to be there. At that point, the officers cited appellant for violating the injunction.

Officer Rodriguez explained that in his experience and training as a gang officer, he knew BPS was one of the largest African-American gangs in the country. He talked to BPS members daily. The gang claimed two territories in Los Angeles. The officer believed Smith was a BPS member because he was wearing BPS clothing in a gang hangout and because he admitted his membership and his moniker.

For the defense, appellant's mother testified that she was not aware her son had been served with the injunction. The name of the adult on the proof of service was that of her father, Benjamin J., who lived with mother and appellant. Her husband, appellant's father, lived in Las Vegas. Appellant testified that he had never been a BPS member, never committed a crime on behalf of the gang, and had never admitted being a gang member to the police.

DISCUSSION

Appellant contends the juvenile court violated his federal constitutional rights to due process and a fair trial by excluding as irrelevant evidence that appellant was not a BPS member. As we explain, the minor is correct in arguing the court unfairly prevented him from collaterally challenging the gang injunction's constitutionality, as applied to him as a non-gang member.

During cross-examination of Officer Rodriguez, the defense sought to elicit testimony that appellant had not been arrested for any of the various crimes the officer

had identified as those typically engaged in by the BPS gang. The officer admitted that appellant had not been arrested for robbery or for selling narcotics.[3] After the officer testified that appellant had not been arrested for possession of a firearm or grand theft, the prosecution objected to further questions along those lines as "belaboring." In response to the juvenile court's inquiry into the relevancy of whether appellant had been arrested for BPS-related crimes, the defense explained that it tended to show appellant was not a BPS member. The court sustained the objection, finding the evidence irrelevant because being a BPS member was not an element of the charged offense of violating the gang injunction. The court explained that the injunction was a valid court order, appellant had been served with it, and his conduct was proscribed by the injunction's terms. As such, the court reasoned, appellant's status as a gang member was not relevant.

The defense clarified that the purpose of proving appellant's non-membership was to show that the gang injunction did not properly apply to the minor, regardless of whether it had been served upon him. The juvenile court ordered a break in the proceedings to allow trial counsel to present authority for that argument. In response, the defense argued that consistent with *People v. Gonzalez* (1996) 12 Cal.4th 804,[4] the evidence was relevant to support a collateral challenge as to the validity of the injunction "because it was issued to a non-member." The court found the argument unconvincing

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[3] The officer testified that appellant had been arrested for possession of marijuana.

[4] "'[U]nder California law, [a person] may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such* disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong.'" (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 818-819; see also *id.* at p. 808 ["Settled California law establishes that there can be no contempt of a void injunctive order, and that assertedly unconstitutional injunctive orders are subject to challenge when contempt is charged . . . . [The defendant] was entitled to defend against the contempt charges on the ground the injunction he was accused of violating was unconstitutional."].)

because the terms of the injunction made it applicable not only to BPS members, but also to those who acted in concert with a gang member to violate its terms.

During the defense case, the prosecution objected to the proffered testimony of Dorsey High School coach Irving Davis, who would testify that he knew appellant and was very familiar with BPS members because he had coached in that neighborhood for 19 years. Coach Davis would testify that from his personal knowledge of the gang and of appellant, the minor did not belong to the gang. The juvenile court sustained the objection on the ground of lack of relevance, reasoning that the prosecution was not obligated to prove appellant was a gang member because the injunction was not only applicable to BPS members. Given that the prosecution had established that appellant had been served with the injunction and implicitly had the ability to comply with it, lack of gang membership would not be a defense.

Defense counsel made offers of proof for two other witnesses to support the same collateral challenge. Horace Brown, who supervised appellant at the middle school attendance office where appellant worked for nearly a year, would testify that the minor was an excellent worker who did not present himself in any manner as being a BPS member. Shawana McBride, appellant's middle school teacher, would also testify based on her observations that he was not a gang member. The juvenile court sustained the prosecution objection to their testimony on the same ground.

Our analysis begins with the recognition that appellant was entitled to defend himself from the contempt charge by mounting a collateral attack on the constitutionality of the underlying injunction as it applied to him. "California courts . . . apply the rule that in the contempt proceeding, the contemner may, for the first time, collaterally challenge the validity of the order he or she is charged with violating." (*People v. Gonzalez, supra*, 12 Cal.4th at p. 819; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 (*Acuna*) [recognizing availability of an "as applied" challenge to the gang injunction]; see also *People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506, 1518 (*Broderick Boys*) ["Although the remedy of suffering an arrest and defending

a contempt charge is *available*, it is not generally *prudent*."], citing *In re Berry* (1968) 68 Cal.2d 137, 148-149.) Therefore, it was error to consider the relevance of appellant's BPS membership (or lack thereof) solely as a direct defense to the contempt charge. Rather, as appellant argued below and on appeal, we must assess the prejudicial effect of the juvenile court's evidentiary ruling in terms of its impact on the viability of the collateral attack the defense sought to pursue.

In that regard, it has been consistently recognized that the constitutionality of gang injunctions is premised on their being directed at members of, or active participants in, a specific gang. For instance, in our Supreme Court's seminal *Acuna* decision, the high court rejected an as-applied challenge to an analogous gang injunction based on the defendants' constitutional free speech and associational rights. In so doing, the *Acuna* court explained that the speech and associational limitations imposed on persons subject to the injunction did not burden any more speech than necessary because the injunction's restrictions applied to *gang members* who engaged in the proscribed conduct within specified geographic limits. (*Acuna, supra,* 14 Cal.4th at pp. 1120-1121.) As justification for making the particular named defendants subject to the gang injunction, the *Acuna* court explained: "[I]t is enough to observe that there was sufficient evidence before the superior court to support the conclusions that the gang and its members present in Rocksprings were responsible for the public nuisance, that each of the individual defendants either admitted gang membership or was identified as a gang member, and that each was observed by police officials in the Rocksprings neighborhood." (*Id.* at p. 1125.)

While a gang injunction's legitimate application can extend to persons other than those formally recognized as gang members, such extended application must be premised on the person's active involvement in the gang. "[A gang] injunction imposes limitations on otherwise lawful activities on any person who is a gang member *or acting with a gang member*. [Citations.] For purposes of a gang injunction, a person is a member of a gang if he or she 'is a person who participates in or acts in concert with an ongoing

organization, association or group of three or more persons . . . having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. The participation or acting in concert must be more than nominal, passive, inactive or purely technical.' [Citation.] That is, a person is subject to the injunction *if the state proves by clear and convincing evidence that the above definition is met.*" (*Broderick Boys, supra,* 149 Cal.App.4th at p. 1517.)[5]

Evidence of gang affiliation and participation is therefore directly relevant to an as-applied collateral challenge. We emphasize again that appellant's contention is not one of error in excluding evidence bearing on a direct defense to contempt. Rather, he contends that the juvenile court's evidentiary ruling violated his constitutional rights to due process right and to present a defense by excluding evidence essential to a collateral challenge to the application of the injunction. We therefore apply the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the error was harmless beyond a reasonable doubt. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [a defendant's due process right to a fair trial may be violated by the exclusion of evidence critical to the defense]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) Contrary to the juvenile court's finding, appellant correctly argued that his asserted non-status as a BPS member and the lack of evidence of his participation in the gang's illegal

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5 In *Broderick Boys*, the court stated, "appellants, having been served with the injunction, could be liable for contempt by aiding or acting in concert with a member, whether or not they were a member or 'affiliated' with the gang." (*Broderick Boys, supra,* 149 Cal.App.4th at pp. 1517-1518.) As we have explained, liability for contempt is an independent, if closely related, issue from that of the underlying injunction's legitimate application to persons who are not gang members. Moreover, the above-quoted statement was made in the context of finding that the defendants had standing to challenge the injunction itself.

activities was highly relevant to the determination of whether the injunction legitimately applied to him—regardless of his awareness of the injunction's terms based on personal service of the order itself. After all, a finding based on substantial evidence that defendant was an active BPS member would suffice to establish the injunction's legitimate applicability to the minor.

By precluding appellant from adducing evidence bearing directly on a legitimate collateral challenge to the injunction's application to him, the juvenile court prevented him from raising a potentially viable defense. Given that the prosecution's showing as to appellant's gang affiliation and active involvement in gang activity was far short of overwhelming, we cannot find the exclusion of relevant defense evidence harmless beyond a reasonable doubt.

"As a general rule, it is well established that if the defendant secures on appeal a reversal of his conviction based on trial errors other than insufficiency of evidence, he is subject to retrial." (*People v. Hernandez* (2003) 30 Cal.4th 1, 6.) Because appellant also challenges his conviction on the ground of constitutionally insufficient evidence, we assess that claim for the purpose of determining whether retrial is barred. Appellant argues the true finding of contempt cannot stand because there was no substantial evidence that he knew he was associating with gang members or knew he was trespassing in violation of the injunction's terms. We disagree.

"The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases: we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.)" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) That is, our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard of review is the same in cases where the

prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Penal Code section 166, subdivision (a)(4) provides in pertinent part that misdemeanor contempt of court consists in "[w]illful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial." Here, the prosecution presented evidence that on July 25, 2006, the juvenile court granted a preliminary injunction against the BPS gang, its members, and all persons acting in association with them. The injunction restrained the gang members and persons acting in concert with them from taking part in specified activities found to be nuisances within defined boundaries of Los Angeles. Among the proscribed activities were associating "with any known [BPS] gang member" and trespassing in any property not open to the general public without the owner's consent.

As appellant correctly points out, it has been consistently held that gang injunctions are interpreted to require proof that the person charged with violating the injunction acted with knowledge that the persons with whom he or she was associating with were members of the enjoined gang. (E.g., *Acuna, supra,* 14 Cal.4th at p. 1117.) He errs, however, in arguing there was no substantial evidence that appellant knew Smith was a BPS member at the time he was associating with him and trespassing at the Santa Rosalia apartment complex. The juvenile court was entitled to credit the prosecution evidence that appellant was a BPS member with a gang moniker, who previously associated with BPS members and had worn BPS attire. Also, the prosecution presented credible evidence that at the relevant time Smith was a BPS member who was dressed in BPS attire was standing in BPS territory at a gang hangout. Moreover, according to the prosecution witnesses, both appellant and Smith admitted knowledge of the gang injunction and their BPS affiliation. Under such circumstances, it would have been

entirely reasonable for the court to infer that appellant knew Smith was a BPS member, rather than merely a Cardinals fan.

The prosecution also presented strong evidence that appellant knowingly trespassed in violation of the gang injunction. There was uncontradicted evidence that appellant and Smith were standing together next to a clearly visible no-trespassing order posted at the apartment security gate. Detailed testimony was presented as to the location where appellant and the others were standing in relation to the sign and apartment complex boundaries. When detained for trespassing, appellant confirmed that he had been served with the injunction. Cole, the other male in the company of appellant and Smith, said he lived in the apartment complex, but the other two had no legal right to be there. Appellant neither asserted a lack of knowledge nor offered any justification for his presence, either at the time of his arrest or at trial. Again, the court had a strong basis for inferring that appellant knew he was trespassing at the relevant time. The prosecution is therefore not barred from retrying appellant for contempt, if it chooses to do so.

DISPOSITION

The judgment is reversed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.